

1 TRACY L. WILKISON
Acting United States Attorney
2 CHRISTOPHER D. GRIGG
Assistant United States Attorney
3 Chief, National Security Division
CAMERON L. SCHROEDER (Cal. Bar No. 255016)
4 Assistant United States Attorney
Chief, Cyber & Intellectual Property Crimes Section
5 1500 United States Courthouse
312 North Spring Street
6 Los Angeles, California 90012
Telephone: (213) 894-0596
7 Facsimile: (213) 894-2927
E-mail: cameron.schroeder@usdoj.gov
8 ADAM ALEXANDER
Assistant United States Attorney
9 U.S. Attorney's Office for the District of Alaska
222 W. 7th Avenue, Suite 253
10 Anchorage, AK 99505
Telephone: (907) 271-2309
11 E-mail: adam.alexander@usdoj.gov

12 Attorneys for Plaintiff
UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 MATTHEW GATREL,

19 Defendant.

No. CR 19-00036-JAK

GOVERNMENT'S STATEMENT REGARDING
ADMISSIBILITY OF CO-CONSPIRATOR
STATEMENTS

Trial Date: August 26, 2021

Trial Time: 8:30 AM

Location: Courtroom of the Hon.
John A. Kronstadt

21
22 Plaintiff United States of America, by and through its counsel
23 of record, the Acting United States Attorney for the Central
24 District of California and Assistant United States Attorneys Cameron
25 L. Schroeder and Adam Alexander, hereby submits to the court this
26 Statement Regarding Admissibility of Co-Conspirator Statements.
27
28

1 Dated: September 13, 2021

Respectfully submitted,

2 TRACY L. WILKISON
Acting United States Attorney

3 CHRISTOPHER D. GRIGG
4 Assistant United States Attorney
Chief, National Security Division

5
6 /s/

7 CAMERON L. SCHROEDER
ADAM ALEXANDER
Assistant United States Attorneys

8 Attorneys for Plaintiff
9 UNITED STATES OF AMERICA
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The question of whether a conspiracy existed in order to admit
3 co-conspirator statements under Rule 801(d)(2)(E) is a preliminary
4 factual determination that the Court makes Rule 104(a). In making
5 its determination, the court is not bound by the rules of evidence,
6 except those with respect to privileges. Similarly, Rule 1101(d)(1)
7 states that the Rules of Evidence (other than with respect to
8 privileges) shall not apply to "[t]he determination of questions of
9 fact preliminary to admissibility of evidence when the issue is to
10 be determined by the court under rule 104." Bourjaily v. United
11 States, 483 U.S. 171, 177-78. While the Court here has previously
12 considered admissible evidence, the conspiracy at issue in this case
13 is also laid bare by evidence that would not otherwise be
14 admissible.

15 The government has established that for the statements
16 challenged by defendant, the declarants were part of defendant's
17 conspiracy by showing that they were corroborated by other evidence.
18 In particular, the government has shown purchase by those co-
19 conspirators of defendant's services (as shown in his database),
20 other statements by those persons and others showing the existence
21 of the conspiracy, the listing of those users in defendant's user
22 tables, and the appearance of attacks by those users (in the case of
23 DownThem) in the attack table itself. In addition, the government
24 proffered, and attaches hereto, further evidence showing the
25 participation of Andy Rakhshan (AndyfromCanada@gmail.com) and David
26 Bukoski (Quantum Booter). Specifically, Rakhshan pleaded guilty to
27 conspiracy to commit a violation of 18 U.S.C. § 1030(a)(5)(A), and
28

1 admitted in his plea that "It'sFluffy" (which the government has
2 shown to be Mr. Gatrel) was a service he used to conduct attacks.
3 Similarly, Mr. Bukoski specified in his post-arrest interview that
4 he used AmpNode for his attack server to conduct his Quantum Booter
5 service (transcription attached). The government has thus amply
6 shown by multiple sources of evidence that these individuals were
7 members of defendant's conspiracy. Indeed, the government believes
8 it has already shown this conspiracy's existence beyond a reasonable
9 doubt - but this additional inadmissible evidence puts the proof far
10 beyond what is required for the initial threshold of admissibility.
11 The law of this Circuit and the Supreme Court is clear that the
12 preponderance standard is a very low burden to meet before co-
13 conspirator statements to be allowed to be presented to the jury.
14 Which is as it should be: defendant can of course argue to the jury
15 that they should not find such a conspiracy by the higher standard
16 the government must prove for conviction, but that is a question
17 that is rightfully - and legally - left to the ultimate finder of
18 fact in this case.

19 "The substantive criminal law of conspiracy, though it
20 obviously overlaps in many areas, simply has no application to this
21 evidentiary principle." United States v. Peralta, 941 F.2d 1003,
22 1007 (9th Cir. 1991), as amended on denial of reh'g (Oct. 31,
23 1991) (citing United States v. Gil, 604 F.2d 546, 549-550 (7th
24 Cir.1979)). Defendant makes much of the language in United States
25 v. Silverman that "a co-conspirator's statement implicating the
26 defendant in the alleged conspiracy must be corroborated by fairly
27 incriminating evidence." 861 F.2d 571, 578 (9th Cir. 1988). But as
28

1 has been observed by courts since Silverman was published, whatever
2 "fairly incriminating evidence" means, "it cannot mean that evidence
3 other than the co-conspirator statements has to establish a
4 defendant's participation in a conspiracy by a preponderance of the
5 evidence. If that were the case, there would be no point in saying,
6 as the Rule does, that the Court 'must' consider the purported co-
7 conspirator statement(s) because the non-statement evidence would
8 always be sufficient on its own to overcome the Rule 104(a) burden."
9 United States v. Ortega-Garcia, No. CR 17-203 DSF, 2017 WL 11439800,
10 at *1 (C.D. Cal. Dec. 11, 2017), aff'd, 748 F. App'x 172 (9th Cir.
11 2019). Therefore, this Court should find the previously challenged
12 co-conspirator statements admissible for all purposes in this trial,
13 and allow the jury to determine what weight to give them.